THE ENVIRONMENTAL LAW DIVISION BULLETIN

February 1996 Volume 3, Number 5

Published by the Environmental Law Division, U.S. Army Legal Services Agency, ATTN: DAJA-EL, 901 N. Stuart St., Arlington, VA 22203, (703) 696-1230, DSN 426-1230, FAX 2940. The opinions expressed herein do not necessarily reflect the views of The Judge Advocate General or the Army.

Editor's Note

The March Bulletin will officially launch ELD's new procedure of distributing the Bulletin via electronic mail. The Bulletin will be sent by E-mail this month, as well as by U.S. mail, to all those who have provided me with their E-mail addresses. If you have sent me your E-mail address and you only receive this month's Bulletin via U.S. mail, please contact me so that I can correct the problem. Otherwise I will proceed to delete you from the U.S. mail list so that you only receive the Bulletin via E-mail. If you have not yet sent me your E-mail address, please do so as soon as possible. Thank you for your cooperation in this effort. Ms. Fedel.

Interim Guidance Issued - LTC Olmscheid

The EPA issued interim guidance on federal enforceability of limitation on the potential to emit (PTE), in light of two recent federal court decisions, National Mining Association v. EPA, 59 F.3d 1351 (D.C. Cir. 1995), and Chemical Manufacturers Ass'n v. EPA, No. 89-1514 (D.C. Cir. Sept. 15, 1995). A source's PTE is the amount that determines whether a source is "major" under various Clean Air Act (CAA) programs.

The EPA's former position had been that only federally enforceable measures were limits on a source's PTE. This requirement still applies to the CAA Title V and Hazardous Air Pollutant programs. It no longer applies to the PSD/NSR program, unless a state has implemented rules requiring federal enforceability as a condition of limiting the PTE.

This provision impacts installations that are major sources under the PSD/NSR program, and do not have federal enforceability provision regulating the PSD/NSR program in their applicable SIP. The impact depends a great deal on when, and if, EPA amends this provision. The EPA has indicated that promulgating regulations reinstating this requirement has a high priority within the agency.

Clean Water Act Enforcement - MAJ Saye

The United States Supreme Court has denied certeriori in a case in which the Second Circuit upheld a conviction for a knowing violation of the Clean Water Act (CWA). United States v. Hopkins, 53 F.3d 533 (2nd Cir. 1995), ***cert. denied***, 64 U.S.L.W. 3484 (U.S. Jan. 16, 1996)
(No. 95-609).

Appellant was convicted in United States District Court for the District of Connecticut of falsifying, tampering with, or rendering inaccurate a monitoring device, violating restrictions of a discharge permit issued pursuant to the CWA, and conspiracy. He was sentenced to 21 months imprisonment and ordered to pay a $7500 fine. At trial, the jury was instructed that it was not necessary for the government to prove that the defendant intended to violate the law or had any specific knowledge of the particular statutory, regulatory, or permit requirements imposed under the CWA. This instruction was appellant's principal grounds for appeal.

The Second Circuit held that the CWA section establishing criminal penalties for any person who "knowingly" violates the statute does not require proof that defendant knew he was violating the CWA or a permit issued thereunder, only that he knew the nature of his acts. The holding in the Hopkins case is consistent with that in United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1993), ***cert. denied***, 115 S.Ct. 939 (1995), which was discussed in the February, 1995 ELD Bulletin. As I indicated at that time, ELSs should ensure that the appropriate individuals at their installation are aware of this line of cases.

EPA Appeals Wausau Decision and Issues Guidance on Supporting Penalty Calculations - CPT Anders

The EPA has taken defiant action in response to Chief Administrative Law Judge John Lotis' decision in In re Employers Insurance Company of Wausau and Group Eight Technology, Inc., TSCA-V-C-66-90, 1995 TSCA LEXIS 15 (1995). In that decision, Chief Judge Lotis ruled that EPA's penalty policies for environmental violations do not bind judicial penalty decisions, unless those policies are promulgated through a formal public notice and comment rulemaking process under the Administrative Procedure Act. The Wausau decision obligates the EPA, through evidence presented at the hearing, to support any findings, assumptions, or determinations on which its assessed penalty rests. Then, as long as the hearing judge has "considered" the policy, he or she is free to apply the penalty policy or to depart from it, basing the decision solely upon the strength of the parties' evidence. 1995 TSCA LEXIS at 36-37. See also, ***Environmental Law Division Bulletin***, Vol. 3, No. 2, p. 5 (Nov 1995). In the Wausau decision, Judge Lotis lowered the assessed fine under the Toxic Substances Control Act from $78,000.00 to $66,000.00.

Appeal of Decision

The EPA has appealed the Wausau decision, urging the EPA Environmental Appeals Board (EAB) to overturn the ruling, and assess an appropriate penalty or remand the penalty assessment for explanation by the ALJ. In its administrative appeal brief, filed 15 December 1995, EPA argues that the applicable environmental statute, not its penalty policy, dictates the amount of an assessed penalty for violation of that statute. In re Employers Insurance Company of Wasau and Group Eight Technology, Inc., Brief for Appellant, EPA EAB, TSCA Appeal No. 95-6, December 15, 1995. EPA contends that the the respective environmental penalty policies are merely "useful tools" in interpreting the statutory penalty guidance; it is the statutes, not the penalty policies, that control the agency's penalty practice.

Significantly, one approach taken by the EPA was to argue that the defendants in the case did not dispute the proposed penalty of $78,000.00. It remains to be seen whether this position is accepted by the EAB, but it should place military practitioners on notice that, when a penalty is assessed against your installation, tacit acceptance of the penalty may be used against you in further proceedings.

Issuance of Policy Guidance

Pending an EAB decision on the Wausau case, the EPA has issued internal policy guidance directing its attorneys to build a case for administrative fines sought in enforcement actions. The guidance document ("Memorandum") was written by Robert Van Heuvelen, Director of EPA's Office of Regulatory Enforcement and dated 15 December 1995, the same date as the appellate brief. See, USEPA, Office of Regulatory Enforcement, ***Memorandum to EPA Regional Offices on Use of Penalty Policies in Administrative Cases, Dated Dec. 15, 1995***.

The Memorandum specifically cites the Wausau case, commenting that, "[w]e think the decision in the Wausau [sic] case is inconsistent with decisions on the use of penalty policies by the Environmental Appeals Board . . . ." The Memorandum echoes the arguments made in the appellate brief, stating that EPA's penalty policies "are not substantive rules under the
Administrative Procedures Act," but rather are "a mix of legal interpretations, general policy and

procedural guidance in how EPA should allocate its enforcement resources and exercise its enforcement discretion." The penalty amount sought in the complaint, according to the Memorandum, is "based upon the relevant statutory factors." This claim is suspect, considering the Memorandum's plain directive that "the penalty amount pled should be calculated pursuant to [the] applicable penalty policy . . . ."

The Memorandum directs its attorneys to follow specific procedures, some of which military practitioners may find helpful. For example, "[i]n the prehearing exchange or hearing, the facts relevant to determining an appropriate penalty under the particular statute should be presented as evidence." This directive will hopefully arrest the practice in some Regions of refusing to disclose the penalty calculation worksheets and accompanying narratives. Of course, the allowance that the materials be presented in pre-hearing exchange **or** at hearing fails to address the discovery problem directly.

Also, the Memorandum instructs the EPA attorneys to maintain a "case `record' file," which documents all factual information relied upon in developing the penalty amount pled in the complaint. At the very least, this internal requirement that penalties must be factually supported should preclude assessment of an arbitrary penalty amount. Unfortunately, the directive uses permissive, rather than mandatory, language by stating that, "[i]n the prehearing exchange, EPA counsel may provide the Respondent with copies of relevant documents from the case file." The accompanying footnote, however, provides that only final, disclosable documents should be maintained in the case record file. This suggests a policy that the documents in that file are to be disclosed in prehearing exchange. If you encounter a problem obtaining disclosure of the EPA penalty calculation worksheets and narratives, cite to this EPA guidance as support for your position.

Policy on Ordnance and Explosives - Ms. Fedel

On 5 July 1995, the Directorate of Military Programs for the U.S. Army Corps of Engineers issued a Memorandum for the Commander, U.S. Army Engineer Division, Huntsville, that provides new guidance on the technical terms that should be used in addressing ordnance and explosives issues. The U.S. Army Engineering and Support Center, Huntsville, (CEHNC) (formerly the Mandatory Center of Expertise (MCX) and Design Center for Explosive Ordnance (EXO), Huntsville, CEHND) is the Corp's center of expertise for issues involving ordnance and explosives, such as when the Corps has been hired to coordinate response actions involving unexploded ordnance (UXO) at closed, transferring, or transferred ranges. The guidance directs that in all USACE actions to reduce the risk of endangerment from ordnance and explosives, the term "ordnance and explosives (OE)" will replace the term "ordnance and explosive waste (OEW)." The guidance further directs that terms related to cleanup of hazardous, toxic, and radioactive materials, such as "waste" and "remediation," will be avoided unless they directly apply to the circumstances.

This guidance should be adhered to by all installations that are dealing with UXO issues, as it is a direct reflection of the position that DA has taken in negotiating UXO cleanups with federal and state regulators. ELSs should ensure that this guidance is followed in all environmental documentation that addresses UXO concerns.

U.S. Supreme Court Hears KFC Western Argument - Ms. Fedel

On 10 January 1996, the United States Supreme Court heard arguments in KFC Western, Inc. v. Meghrig, 49 F.3d 518 (9th Cir. 1995), ***cert. granted***, Meghrig v. KFC Western, Inc., No. 95-83 (Sept. 27, 1995). The issue before the Court is whether cost recovery actions are available pursuant to RCRA's imminent hazard citizen suit provisions, 42 U.S.C. §6972(a)(1)(B). The Ninth Circuit decision would allow a §6972(a)(1)(B) cost recovery where the conditions at the time of remediation ***may*** have presented an imminent and substantial endangerment, ***even*** where the endangerment has been abated by the remediation.